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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 766

CLIFFORD J. HYNNING, *Petitioner*,

v.

DANIEL PARTRIDGE, III, *Respondent*.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The question here is one of interpretation of a private contract between private individuals relative to property located in the District of Columbia.

On June 30, 1961, respondent sold two residences on N Street, N. W., Washington, D. C., which he owned

as testamentary trustee, to petitioner, who desired to convert them into an office building (R. 61). Petitioner paid for the property partly in cash, partly by assuming an existing mortgage (R. 7), and partly by giving respondent a purchase money deed of trust, and respondent agreed to subordinate his purchase money deed of trust to a new first trust to be obtained by petitioner for the purpose of remodeling, provided the entire net proceeds of the new trust be devoted to the remodeling (R. 10).

On March 15, 1962, petitioner obtained a loan of $132,500 (R. 35) from Perpetual Building Association, and on the same day respondent subordinated his purchase money deed of trust to the trust securing the new loan (R. 36-39). The new loan ran for 18 years, and the note provided, "Loan not to be paid off during the first five-year period" (R. 35-6). Petitioner's remodeling costs exceeded the net proceeds of his loan by about $37,800 (R. 62). In April 1963, after the remodeling was completed he asked respondent to subordinate again, this time to a new and larger trust loan which would include the amount of the existing first trust plus the amount of the excess costs (R. 13). Respondent refused becouse he thought it unwise to reduce the security for the second trust loan (R. 13). The Court of Appeals unanimously held that respondent complied with his agreement when he subordinated on March 15, 1962 and that the contract did not require him to subordinate again (R. 61-63).

Thus the issue is purely one of local law, and it has been decided by the highest court of the local jurisdiction. Cf. *Griffin* v. *United States*, 336 U.S. 704, 717-8 (1949). reh. den. 337 U.S. 921 (1949).

ARGUMENT

I. The Court of Appeals Has Not Violated Rule 56.

Petitioner seeks to inject a federal flavor by contending that the Court of Appeals violated Rule 56 of the Federal Rules of Civil Procedure. The Court, he alleges, (1) stated facts materially at variance with the facts of record and (2) brought in an issue of credibility. Respondent replies that the Court did neither of these things.

(1) The matter came before the trial court on cross motions for summary judgment. The parties agreed before the trial court that the case involved only an issue of law (R. 93). The trial court interpreted the contract as requiring respondent to subordinate to the total amount required for remodeling and therefore directed him to subordinate a second time (R. 55). The Court of Appeals reversed, and held that respondent's subordination of March 15, 1962 fulfilled his contract obligations (R. 63). Thus, the Court of Appeals has decided a question of local contract law.

Petitioner points particularly to the penultimate paragraph of the Court of Appeals' decision (R. 63). That paragraph reads:

> "Hynning's [petitioner's] position is that Partridge's [respondent's] agreement to subordinate his lien 'to a new first trust' was not met when the latter subordinated to the Perpetual deed of trust on March 15, 1962, because he claims the Perpetual financing was a construction loan only, and that later permanent financing was contemplated after the cost of remodeling had been determined. This is belied by the fact that the Perpetual loan, although it provided for advancements as the reconstruction progressed, was to run 18 years and

> could not be paid off before March 15, 1967. Thus, the Perpetual loan was not merely a temporary construction loan but was permanent financing, and Perpetual's deed of trust was 'a new first trust' to which Partridge subordinated, as agreed in the contract of sale."

Petitioner contends that the Court misstated his position by injecting the word "only" in the first sentence of the quoted paragraph (Petition, p. 9). In this sentence the Court paraphrased petitioner's position. The paraphrasing is completely fair. In six places in his complaint (R. 3, 4, 5) petitioner characterizes his $132,500 loan as a construction loan. It is true that he does not call it a construction loan "only," but neither does he call it anything else. And if the word "only" is omitted from the opinion the sense is not changed. Also in his complaint petitioner quotes the broker as saying that it is customary on remodeling jobs to obtain first a construction loan and then to replace it with a permanent loan (R. 5). It is difficult, therefore, to fault the Court's statement of petitioner's position.

The Court then states that petitioner's position is erroneous because the $132,500 loan was to run for 18 years and could not be paid before March 15, 1967. The Court says that the loan was a permanent loan and that the trust which secured it was "a new first trust" within the meaning of the contract between petitioner and respondent (R. 63). The loan was in fact an 18-year loan, and by its express terms it could not be paid off for five years from March 15, 1962 (R. 35-6). It is true that the parties to the loan agreement, like any contracting parties, could always change their contract by a later agreement, supported by consideration, but

that does not alter the fact that the loan, as the note was written, expressly provided that it could not be paid off for five years. If it was true the lender administered the loan on an open basis during the construction period (see R. 49), it is equally true that this was no communicated to respondent (R. 53), that respondent was not a party to any understanding in that regard, and that respondent understood he was subordinating to a construction loan and relied on that fact (R. 28-29).

Nomenclature is not important. The crux of the matter is that respondent agreed to subordinate to a new first trust to be obtained in connection with the remodeling, that petitioner obtained such a loan, secured by a deed of trust, which was to run for 18 years and which could not by its terms be paid off for the first five years, and that respondent subordinated to it. Respondent did not contemplate any further subordination, nor did he have any reason to do so, and the Court of Appeals has correctly decided a question of local contract law.

Petitioner also points to the last paragraph of the Court's opinion, wherein the Court said that apparently petitioner did not have a firm contract for the remodeling work but simply estimated his costs and later found that he had underestimated (R. 63). This is no more than a fair comment on the record.

(2) The Court of Appeals did not inject an issue of credibility. It had no need to do so, because the documents speaks for themselves. It held simply that by his subordination of March 15, 1962 respondent had subordinated to the "new first trust" specified in his original agreement with petitioner. The parties them-

selves, by their cross motions for summary judgment and by their statements to the trial court that the only issues before it were issues of law (R. 93), reduced the case to an interpretation of the documents, pleadings and affidavits, and to the extent that there were any conflicting facts in the affidavits the parties in effect told the trial court that any such conflicts were unimportant and should be disregarded.

II. The Argument That the Court of Appeals Exhibited a Mechanical Style of Reasoning.

Petitioner criticizes the Court of Appeals for exhibiting what he calls a mechanical style of judicial reasoning (Petition, p. 8), but as he himself points out, this argument is addressed to the Court's allegedly erroneous interpretation of the contract (Petition, p. 11). Petitioner does not claim that this is one of the "exceptional situations where egregious error has been committed" in deciding a local question (see Griffin v. U.S., *supra*, at page 718). Actually the decision below seems clearly correct. Further, it relates purely to a matter of local, private contract law, and it turns on its own narrow facts and can affect few, if any, other people.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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